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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD W. WYRICK,
Petitioner,

v.

WILLIE WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

STEVEN W. GARRETT
Assistant Attorney General
of Counsel

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri Supreme Court is bound by *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.ED.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.593, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980),

conflicts with this Court's decision rendered in *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)?

5. Whether the Missouri Supreme Court's Order and Writ of Habeas Corpus issued in *Williams* v. *Wyrick*, No. 62879 (Mo. banc, June 15, 1981), conflicts with this Court's decision in *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

6. Whether the Missouri Supreme Court's Order and Writ of Habeas Corpus issued on June 15, 1981 is proper in light of the orders issued by this Court in *Missouri* v. *Counselman*, No. 80-754; *Missouri* v. *Brown*, No. 80-1368; *Missouri* v. *Greer*, No. 80-997; and *Missouri* v. *Lowery*, No. 80-1561?

PARTIES

In the Missouri Supreme Court, the parties were: Willie Williams, petitioner, and Donald W. Wyrick, respondent.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, Donald Wyrick, Warden, Missouri State Penitentiary, respectfully requests that a writ of certiorari issue to review the final order of the Missouri Supreme Court in this case.

OPINIONS BELOW

The Missouri Supreme Court's Order and Writ of Habeas Corpus is styled and numbered as follows: Willie Williams, a/k/a Willie J. Williams, petitioner, v. Donald W. Wyrick, Warden, Missouri State Penitentiary, respondent. A copy of the Order is reprinted as Appendix A.

A copy of Willie Williams petition for a writ of habeas corpus filed in the Missouri Supreme Court is reprinted as Appendix B.

A copy of Donald Wyrick's "Response To Order to Show Cause Why a Writ of Habeas Corpus Should Not Issue" is reprinted as Appendix C.

A copy of the "Return" filed by Donald Wyrick is reprinted as Appendix D.

JURISDICTIONAL STATEMENT

The Missouri Supreme Court's Order and Writ of Habeas Corpus was issued in this cause on June 15, 1981. Consequently, the present petition is filed within sixty days after the entry of judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 560.120, RSMo 1969, § 560.135, RSMo Supp. 1975, and § 559.225, RSMo Supp. 1976 are set forth in Appendix E.

STATEMENT OF THE CASE

This petition is brought as a result of the Missouri Supreme Court's "Order and Writ of Habeas Corpus" releasing Willie Williams from incarceration at the Missouri State Penitentiary, Jefferson City, Missouri. This history of this case is as follows:

Respondent, Willie Williams, was convicted of robbery first degree, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976. Respondent was sentenced to five years and seven years imprisonment respectively. Furthermore, the sentences were ordered to be served consecutively.

On February 25, 1981, respondent completed service of his robbery first degree sentence and commenced service of his seven year armed criminal action sentence. Thereafter, on March 5, 1981, respondent, Willie Williams, filed a petion for writ of mandamus and/or writ of habeas corpus in the Supreme Court of Missouri.

On April 6, 1981, the Missouri Supreme Court ordered petitioner, Donald Wyrick, to show cause why a writ of habeas corpus should not issue. Thereafter, on April 10, 1981, petitioner filed his response to order to show cause why a writ of habeas corpus should not issue. On May 26, 1981, petitioner, Donald Wyrick, filed his return.

The Missouri Supreme Court issued its order and writ of habeas corpus releasing Willie Williams from custody on June 15, 1981.

Approximately three weeks after respondent filed his petition for a writ of habeas corpus in the Missouri Supreme Court, this Court issued an order in the case of *Missouri* v. *Counselman*, No. 80-754, granting certiorari, vacating judgments, and remanding five cases to the Missouri Court of

Appeals, Eastern District, for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981). Each of the cases remanded to the Court of Appeals in *Counselman* had relied on the Missouri Supreme Court decision of *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980).

On March 30, 1981, this Court remanded several more cases back to the Missouri Court of Appeals, Western District, in *Missouri* v. *Brown*, No. 80-1368. This Court's order in *Brown* was identical to the order issued in *Counselman*. On May 26, 1981, this Court remanded several more cases back to the Missouri Supreme Court; in *Missouri* v. *Greer*, No. 80-997; again, the order was identical to the orders issued in *Counselman* and *Brown*.

On June 8, 1981, this Court remanded yet another case back to the Missouri Court of Appeals, Eastern District, in *Missouri* v. *Lowery*, No. 80-1561. This Court's order in *Lowery* was identical to the orders issued in *Counselman*, *Brown*, and *Greer*.

With the aforementioned orders of this Court outstanding, the Missouri Supreme Court issued its order and writ of habeas corpus in the instant case on June 15, 1981, releasing respondent, Willie Williams, from the custody of the Missouri Division of Corrections based on the Missouri Supreme Court's stated belief that Williams confinement for armed criminal action, the sentence for which had been obtained in a proceeding in which Williams had also been convicted of robbery first degree, was violative of the Fifth Amendment as per *Sours* v. *State*, *supra*.

In addition to the cases remanded back to the Missouri Supreme Court by this Court in *Missouri* v. *Greer*, No. 80-997, the cases remanded back to the Missouri Court of Appeals in *Missouri* v. *Counselman*, No. 80-754, and *Missouri* v. *Brown*, No. 80-1358 have been transferred to the Missouri Supreme Court by the respective Missouri Courts of Appeals.

Consequently, the Missouri Supreme Court's "Order And Writ Of Habeas Corpus" in the instant case was issued after this Court had remanded several cases for reconsideration. It is from the Missouri Supreme Court's order of June 15, 1981, that petitioner seeks this Court's review.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue because the Missouri Supreme Court's "Order And Writ Of Habeas Corpus" issued on June 15, 1981, which relied on *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980) conflicts with recent decisions of this Court. Respondent submits that, in view of this Court's recent decision in *Albernaz* v. *United States,* 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), the Missouri Supreme Court erroneously ordered the release of respondent from custody because it relied on its decision in *Sours* v. *State, supra,* a decision which conflicts squarely with *Albernaz.* In *Albernaz,* this Court held that:

> [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the legislative branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution. [Footnote omitted].

Albernaz v. *United States, supra,* 101 S.Ct. at 1145. In view of the fact that the Missouri Supreme Court in *Sours, supra,* held that the legislature unquestionably intended that punishment be imposed for both armed criminal action and its predicate felony, respondent's armed criminal action sentence violates no federal constitutional right. Indeed, respondent was released from custody solely because the Missouri Supreme Court was of the opinion that his right not to be placed twice in jeopardy had been violated.

Respondent believes that certiorari should be granted in this cause because the Missouri Supreme Court released respondent pursuant to its erroneous decision rendered in *Sours* v. *State, supra.* The Missouri Supreme Court's action was taken after it had been ordered by this Court to reconsider its judgments which relied on *Sours* v. *State* in light of *Albernaz* v. *United States.* Consequently, the Missouri Supreme Court is exhibiting a recalcitrant posture which not only defies several orders of this Court, but also has created tremendous consternation in the Missouri criminal justice system.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

STEVEN W. GARRETT
Assistant Attorney General
of Counsel